## CORPORATION COURT OF RADFORD.

ELLEN M. BROOKS *v.* CITY OF RADFORD.

1. **Demurrer to the Evidence—Statutory Requisites.**—Under the Virginia statute, Acts 1912, p. 75 the grounds of a demurrer to the evidence must be severally and specifically stated in writing, and the court will not consider any ground not so stated.

2. **Municipal Corporations—Liability for Defective Sidewalk—Care Required of Plaintiff—Question for Jury.**—The liability of a municipality for negligence in failing to repair a sidewalk is the same as in case of negligence in construction. Ordinarily, to render it liable for an injury sustained upon a defective walk, the defect alone, or combined with a pure matter of accident, whereof plaintiff is without fault, must have been the sole cause of the injury. Only against injury that results to plaintiff while in the exercise of reasonable care is the municipality bound to indemnify. And generally, it is a question for the jury whether plaintiff was, at the time of receiving the injury, exercising proper care.

3. **Municipal Corporations—Liability for Defective Sidewalk—Care Required of Pedestrian—Contributory Negligence—Assumption of Risk.**—A pedestrian may ordinarily assume that a sidewalk is in a reasonably safe condition for travel, and is not bound to watch constantly for holes or other defects. It is not negligence per se to use a sidewalk out of repair, and though the care required to avoid injury, must increase as the danger of injury increases and is apparent, the degree of care never changes; the sole question being: What would an ordinarily prudent person do in the circumstances? One using a sidewalk which prudent observation would indicate to be dangerous, assumes the risk of such injury as may be incurred from open and apparent defects, such as proper observation should have avoided. But, if there be concealed defects, such as reasonable prudence and care would not detect and injury is caused thereby, a recovery may be had for the injury.

4. **Municipal Corporations—Action for Injury from Defective Sidewalk—Demurrer to the Evidence.**—Under a demurrer to the evidence, in an action against a municipal corporation for a personal injury resulting from a defective sidewalk, the plaintiff is not held to account for that reasonable care ordinarily required of the pedestrian.

5. **Demurrer to the Evidence—Effect.**—A demurrer to the evidence withdraws the case from the jury and admits as true all of plaintiff's proof and every reasonable inference therefrom; and in determining the facts to be inferred from the evidence the court must adopt those inferences most favorable to the demurree.

**6. Demurrer to Evidence—Case at Bar.**—In the case at bar, an action against a municipal corporation for a personal injury resulting from a defective sidewalk, the demurrer to the evidence was overruled.

GARDNER, J.

In her declaration, plaintiff charges that the defendant "did not keep its streets sound, suitable, safe and serviceable for public use and travel, especially the street and sidewalk thereon, along First Street, between, etc.—but negligently, wilfully and wrongfully permitted the sidewalk along the South side of said First Street to become and continue, with the knowledge of defendant, unsafe, dangerous and defective for a long space of time, to-wit: etc.—by permitting the planking and timbers of which said sidewalk was constructed, to become rotted and loosened from the sills by reason whereof plaintiff * * * whilst walking along said sidewalk, as she had a right to do, and whilst exercising due care on her part, one of the rotted and loosened boards of said sidewalk overturned with plaintiff and injured her, to her damage in the sum of five thousand dollars ($5,000.00)."

[1] Like unto the proverbial kimono that enshrouds a beautiful woman, the common-law demurrer to the evidence covers everything and touches nothing. Not so the Virginia Statute. Under Acts 1912 page 75, the cause or grounds of demurrer must be specifically stated—severally and specifically stated—in writing. Unless so stated the court cannot consider it, cannot consider any ground not so stated. This is jurisdictional;—as the affidavit in attachment, in unlawful detainer before a justice, and similar pre-requisites. Defendant, in this case, demurs to plaintiff's evidence, specifying as its grounds of demurrer, that:

"No actionable negligence on its part has been shown."

Relying on its demurrer, defendant offers no proof.

[2] Both under the common law and the Virginia Statute, defendant, a municipal corporation, is liable as if a natural person. The liability of a city extends to negligence in a failure to repair to the same extent as in case of negligence in construction.

Ordinarily, to render a municipality liable for an injury sustained upon a defective walk, the defect alone, or combined with a pure matter of accident, whereof plaintiff is without fault, must have been the sole cause of the injury. Only against accident that results to plaintiff whilst in the exercise of reasonable care is the municipality bound to indemnify. And generally, it is a question of fact for the jury whether plaintiff was, at the time of receiving the injury, in the exercise of proper care.

[3] The well established principle of law is, that it is not negligence, *per se,* to use a sidewalk out of repair. Using a

defective sidewalk, prudently and in a practicable way, must not be said to be negligence as a matter of law. Indeed, it would be a monstrous proposition to require a footman to remain indoors unless and until a dangerous sidewalk, in a populous city, is repaired. A footman may ordinarily assume that a sidewalk is in a reasonably safe condition for travel, or use. The pedestrian is not bound to keep an eye constantly on the sidewalk in a search for holes or other defects. True, the care and diligence required to avoid injury, must increase according as the danger of injury increases and is apparent. The degree of care never changes. The sole question is: What would an ordinarily prudent person do in the circumstances?

The authorities make it clear that one using a sidewalk which observation, prudently exercised, would indicate danger, takes the risk of such injury as may be incurred from open and apparent defects, such as prudent observation should have avoided. But, this is the extent of the risk:—For, if there be latent, or concealed, defects, such as reasonable prudence and care do not detect and injury is caused because of such latent defect, a recovery may be had for that injury, albeit there could be no recovery should the injury result from the observable defect alone —a defect that is open and obvious.

[4] However that may be, defendant's demurrer in this case effectually eliminates the defense of contributory negligence, in my view of the Virginia Statute. Under that demurrer, plaintiff is not held to account for that reasonable care ordinarily required of the pedestrian—not to be charged with that care which the law requires to be exercised by a reasonably prudent person.

Plaintiff's proof abundantly shows that this sidewalk was a wooden structure dangerously constructed. At the point of the accident, it was elevated fully two feet above ground,—knee high, and in places higher, and was notoriously out of repair. According to the proof, "Occasionally, there was a space of a foot to two and a half feet where there was no boards," and "there was one or two missing (planks) in one place, possibly one or two in another, and in several places there was one missing."

This condition of the walk was allowed to continue for a long space of time—one year previous to the accident. Clearly, without excuse or explanation, plaintiff here establishes a *prima facia* case of unreasonable neglect. The witness, Rodifer, when questioned about "this sidewalk in front of your property," promptly and succinctly, answered, "Yes, sir. More often I used the street. When I got ready to use it (the walk) I used it. That is what it was put there for." And A. W. Brooks says that this walk was in constant use; that he had lived at the end of the walk a year; that he had used it continually; that since the accident, the walk

had been taken away, and that at the time of the accident it looked just about as it had always looked, and further said: "There was some places once and awhile that a plank was out and sometimes two."

[5] Now what are the rights of the parties under the proof and considering defendant's demurrer thereto. This demurrer withdraws the case from the jury and likewise admits as true all of plaintiff's proof and all that can be reasonably inferred therefrom.

In determining the facts to be inferred from the evidence, and, in case of grave doubt, the court must adopt those inferences most favorable to the demurree. Mindful of this, let's see what inferences may be drawn from the material testimony in the case pertaining to the accident itself.

Plaintiff herself testifies that there was a hole in the walk, and there was a sound enough looking board, but it was unnailed, or so poorly nailed that it turned with her and threw her to the ground and her foot went through the plank. On cross-examination and responding to a somewhat ambiguous query, she said: "The stringers were up from the ground and the board was nailed on the left side."

From this, counsel for the city stoutly argue that a board, which is nailed on the left side cannot as a physical fact, turn or overbalance. This cannot fairly be taken to minimize, or as in conflict with, plaintiff's original statement that the board was "unnailed or so poorly nailed" it turned with her. Saying that the board was nailed on the left side, which as she explains is the side next the street, was intended rather as descriptive of the location of the nails and the stringers of the structure. Leastways, this is a reasonable inference from her evidence, taken together. The jury may have adopted such inference. This court must do so.

Counsel for defendant further maintain that whilst the city negligently failed to repair the walk by properly supplying the missing planks, the openings, or holes, themselves were not the proximate cause of this injury.

It may be said that when a city has notice, actual or constructive, of defects in its walks, a structure of this character, and neglects to repair for a long space of time, the city is thus chargeable with notice of other defects, of like kind, discoverable if ordinary care had been exercised in repairing the observable defects. Particularly is this true where the defects are part and parcel of the same continuous structure, a structure constructed of stringers and boards as this one was. Any other rule would be extraordinary—monstrous. The city must take due notice of the certain and sudden tendency of sidewalks, constructed of stringers and boards, elevated from the ground, to decay and become rotted and loosened.

And when every few feet, in a wooden structure, a board or two is missing, notoriously so, and has been for a year, it is notice to the city that such walk is egregiously in an unsafe condition and needs repairing probably in its entirety. Surely, a greater degree of care to discover covert, or latent, defects in a structure of this character, is imposed on the city than upon the pedestrian. A pedestrian that has passed over a walk in a defective condition, open and obviously so, many times in safety, cannot be said to be guilty of negligence, *per se,* in endeavoring to do so again. Vol. VI, McQuillin, Municipal Corporations, No. 2765, 2815, &c.

One thing is clear from this evidence: Plaintiff was thrown to the ground and her foot went through this hole and into the mud and water, and thus she was injured. Had the missing planks on either side of the board that turned with her, been properly in place, the board could never have turned with her.

And finally: Here we have a plaintiff who, under defendant's demurrer to the evidence, is not chargeable with ordinary prudence and care; or indeed, with any degree of care, in the use of a sidewalk that is not only egregiously out of repair, but notoriously so—a plaintiff using a sidewalk that it is not negligence *per se* to use and is injured to her damage $425.00, the amount the jury in their verdict assessed.

And here, taken as a whole, plaintiff establishes a *prima facie* case that justifies the verdict of the jury; a *prima facie* case this court cannot ignore and that this court must respect.

Accordingly, an order may go overruling defendant's demurrer, sustaining the verdict of the jury and entering up a judgment in her behalf for the damages so ascertained.

**Note.**

The provisions of Acts 1912, p. 75, 4 Va. Code, 675, are the same as those of the amended act, Acts of 1906, p. 301, 3 Va. Code, 658, except where the Act of 1906 provides: "After joinder in demurrer no other evidence shall be admitted and a nonsuit shall be allowed," the Act of 1912 reads: "Except that the court may, in its discretion, allow the demurrant to withdraw the demurrer; may allow the joinder in demurrer to be withdrawn by the demurree, and new evidence admitted, or a nonsuit be begun until the jury retire from the bar."

**Object of Statute.**—"The object of the act seems to be two-fold: First, to notify the demurree of the grounds or causes of demurrer which the demurrant intends to rely on, and, second, to prevent the demurrant from relying upon one or more grounds in the trial court and then assigning different grounds in the appellate court." Burk's Pl. & Pr., p. 484. This statement is reiterated almost verbatim in the case of McMenamin *v.* Southern Ry. Co., 115 Va. 822, 824, 80 S. E. 596.

**Statute Intended to Accord with Code Provision Relating to Demurrer to Pleading.**—It was the intention of the legislature to make the act accord so far as the statement of grounds is concerned;

with § 3271 of the Code, which authorizes the court, upon a demurrer to a pleading, to require "the grounds of demurrer relied on to be stated specially in the demurrer."

"The demurrant knows, or ought to know, before demurring, in what respect the demurree has failed in his proof, and there is no more hardship in requiring him to specifically state it than there is in requiring a party demurring to a declaration to state specifically his grounds of demurrer. One is a demurrer to his adversary's pleading, and the other to his adversary's proof. In both cases the legislature, it is clear, intended that the grounds of demurrer must be stated with reasonable certainty and that no other grounds than those so stated should be considered. Code, § 3271; Bonos *v.* Ferries Co., supra." McMenamin *v.* Southern Ry. Co., 115 Va. 822, 828, 80 S. E. 596, quoted in Saunders *v.* Southern Ry. Co., 117 Va. 396, 398, 84 S. E. 650.

**Statute Mandatory—Exceptions Not Allowed.**—"These statutory provisions are mandatory and preclude the idea of jurisdiction to consider a demurrer to evidence, unless the grounds of such demurrer are specifically stated in writing. The statute is a wise one that should be upheld and enforced as it is written. Its salutary purpose would be defeated and the statute practically abrogated if it were permissible to modify it by engrafting exceptions upon it." Saunders *v.* Southern Ry. Co., 117 Va. 396, 399, 84 S. E. 650.

**Where But One Ground of Demurrer, or Grounds Known to and Understood by Demurree.**—The provisions of the statute requiring the grounds of a demurrer to the evidence to be specifically stated in writing are mandatory, and the court is without jurisdiction to consider such demurrer unless the grounds are so stated, whether there be one or more grounds of demurrer, and although the grounds of the demurrer be known to and understood by the demurree, so that he has not been prejudiced by the failure of the demurrant to state them as required by the statute. Saunders *v.* Southern Ry. Co., 117 Va. 396, 84 S. E. 650, disapproving Bonos *v.* Ferries Co., 113 Va. 495 and Newberry *v.* Watts, 116 Va. 730, so far as in conflict herewith.

In Saunders *v.* Southern Ry. Co., 117 Va. 396, 84 S. E. 650, the defendant company sought to justify its failure to comply with the plain mandate of the statute upon the ground that there were but two grounds of demurrer relied on which were well known to and understood by the plaintiff, who, therefore, suffered no prejudice or disadvantage whatsoever in consequence of its failure to state the grounds of its demurrer in writing, and relied upon the cases of Bonos *v.* Ferries Co., 113 Va. 495, 75 S. E. 126, and Newberry *v.* Watts, 116 Va. 730, 82 S. E. 703, in support of its contention. The court readily distinguished these cases from the case at bar, in that in each there was but one ground of demurrer to the evidence relied on, which was apparent upon the face of the respective proceedings; whereas, in the case at bar there were two grounds of demurrer relied on, and it is by no means clear that the plaintiff was not prejudiced by the failure to state such grounds in writing. But the court did not rest its decision upon this distinction, and based its decision on the language of the statute which is "too plain to admit of doubt, or to call for interpretation." The court said: "We are of opinion, after a careful and mature consideration of the statute (Acts 1912, p. 75), that the question arising under it is one involving the jurisdiction of the court, and that it is wholly immaterial whether there is one or more grounds of demurrer relied on,

or whether the plaintiff has been prejudiced by the failure of the demurrant to state the grounds of demurrer in writing. * * * So far as the cases of Bonos *v.* Ferries Co., supra, and Newberry *v.* Watts, supra, may be in conflict with the construction herein placed upon the statute in question, they are not approved."

**Degree of Particularity Required.**—The statement of the grounds of a demurrer to the evidence should be sufficient to put the plaintiff completely upon notice of all the points relied on, but it is not necessary to give a discussion of the evidence and specific reasons for each ground relied on. This is not in conformity with our practice, and neither the letter nor the spirit of the statute demands it. Virginia Iron, etc., Co. *v.* Asbury, 117 Va. 683, 86 S. E. 148. The degree of particularity required must depend to some extent upon the character of the case. Where the language used is broad enough to embrace and comprehend any one of several causes of demurrer, but fails to specify any one of them as the particular ground or cause relied on with reasonable certainty, considering the facts and circumstances of the case, it is not a sufficient compliance with the statute. McMenamin *v.* Southern Ry. Co., 115 Va. 822, 80 S. E. 596.

**Illustration of Sufficient Statement of Grounds.**—In Virginia Iron, etc., Co. *v.* Asbury, 117 Va. 683, 690, 86 S. E. 148, an action by an administrator to recover damages alleged to have been sustained by plaintiff's intestate, a miner, as a result of the negligence of defendant, the grounds of demurrer to the evidence stated by the defendant were: (1) The evidence does not show that the defendant was guilty of any negligence which was the proximate cause of the accident. (2) The evidence shows that the decedent of the plaintiff was guilty of negligence which contributed to the accident complained of. (3) The evidence shows that the decedent of the plaintiff knew of the danger and assumed the risk. (4) The evidence shows that the danger was open and obvious and such as ought to have been known to a man of ordinary understanding, and especially to a man of the experience in coal mining which decedent of plaintiff had had, and that if he did not know of the danger he ought to have known thereof. (5) The evidence shows that the plaintiff's decedent violated the law of the State of Virginia in not staying out of the place where he was killed until he got sufficient props to make the place safe and violated the law in undertaking to work in the said place before he had made the same safe. It was held that these grounds fully met the purpose of the statute in requiring the causes of the demurrer to the evidence to be stated.

**Failure to Object as Waiver of Requirement.**—The failure of a demurree to evidence to object to the grounds of demurrer because not as specific as he desires is not a waiver of the requirement of the statute that the demurrant shall state the grounds of his demurrer with reasonable certainty, and that no other grounds than those so stated shall be considered, nor does it give the court the right to consider such grounds. McMenamin *v.* Southern Ry. Co., 115 Va. 822, 80 S. E. 596.

**Compelling Joinder of Party Having Burden of Proof.**—The fact that a party has the burden of proof in a case renders it more difficult for him to resort to a demurrer to the evidence successfully than it would be otherwise, but is no reason why he may not resort to that mode of procedure, and the other party be compelled to join in the demurrer. Bonos *v.* Ferries Co., 113 Va. 495, 497, 75 S. E. 126, wherein the court said: "When Mr. Burks, in his pam-

phlet on 'Demurrer to Evidence,' page 5, which is cited in the petition for a writ of error, states that 'either party may demur to the evidence of the other, but this method of defense is not available to the party who has the burden of proof on any issue,' we take it that he means that, under such circumstances, a demurrer is not capable of being used to advantage by him upon whom rests the burden of proof. But while a party who, under such circumstances, demurs to the evidence undertakes an onerous task, there is no arbitrary rule which denies him relief, but the court must still inquire whether, after disregarding all of the demurrant's evidence which is in conflict with that of the demurree, there remains enough to entitle him to a judgment."

**Admissions and Inferences on Demurrer to Evidence.**—"In Johnson's Adm'r *v.* C. & O. Ry. Co., 91 Va. 171, 21 S. E. 238, there is a satisfactory statement of the rule governing demurrers to evidence. In that case the authorities were considered, and the law stated to be that 'by the demurrer to evidence the party demurring is considered as admitting the truth of his adversary's evidence, and all just inferences which can be properly drawn therefrom by a jury, and as waiving all of his own evidence which conflicts with that of his adversary, and all inferences from his own evidence (although not in conflict with his adversary's) which do not necessarily result therefrom.'" Bonos *v.* Ferries Co., 113 Va. 495, 496, 75 S. E. 126.

**Determination on Conflicting Evidence as to Negligence and Contributory Negligence.**—Where reasonably fair-minded men might well differ on the question of the negligence of the plaintiff, on a demurrer to the evidence by the defendant, the court must render judgment for the plaintiff. Saunders *v.* Southern Ry. Co., 117 Va. 396, 84 S. E. 650, citing Bass *v.* Norfolk Ry., etc., Co., 100 Va. 1, 40 S. E. 100; Fisher's Adm'r *v.* C. & O. Ry. Co., 104 Va. 635, 52 S. E. 373, 2 L. R. A. (N. S.) 954; Wood's Adm'r *v.* Southern Ry. Co., 104 Va. 650, 52 S. E. 371.

B. S.